Supreme Court Issues Decision in Aereo Copyright Case

PUBLIC PERFORMANCE, CLOUD COMPUTING, AND THE VALUE OF BROADCAST TV

By Karen Petruska

8-10 minutes

Addendum: Victory for Copyright Holders

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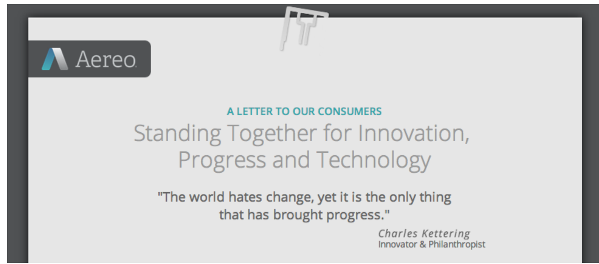
On June 25, the United States Supreme Court ruled against media company Aereo, determining that the company was liable for copyright infringement for delivering broadcast television over the Internet to paying subscribers. Despite founder Chet Kanojia's optimistic outlook on his company's future prospects, lead investor Barry Diller admitted that the fight was "over." Three days after the decision, Aereo announced it would suspend its service until the case, returned to a lower court, is completed.

Basing their decision on a "looks like a duck" argument, the justices deemed Aereo's business was "substantially similar" to the cable industry's business of delivering copyrighted media content over coaxial wires to paying subscribers, and as such, Aereo should be held to the same standards established by Congress to oversee cable companies re-transmission of

content distributed by networks over the airwaves.



Aereo.com

Broadcasters, and their allies, celebrated the decision as a victory over the “theft” of their content, while those who supported Aereo mourned the ways the decision may “send chills down the spines of Silicon Valley entrepreneurs.” Attorneys on SCOTUSblog argued that the decision was either “obvious to anyone who reads the text of the Copyright Act” or a path towards an uncertain future, unsettling established interpretations of key legal terms like “performance,” “public,” and “transmit.”

Despite the fact that lawyers will likely debate the implications of the court’s decision for years to come, one thing is clear—the Court has upheld the structure and operations of the current broadcasting industry by deferring to the Copyright Act of 1976, which brought the cable industry, and now also Aereo, firmly under the authority of the U.S. copyright regime. In doing so, the court avoided a complex analysis of Aereo’s technological operations, a system composed of thousands of tiny antennae designed seemingly to avoid copyright infringement. Instead, the decision asserted that Aereo’s technology “does not make a critical difference here,” prioritizing instead the spirit of copyright law and the intent of Congress to protect the rights of copyright holders. While critics of the Supreme Court

have noted (or mocked) the justice’s lack of familiarity with technology, their decision to avoid a complex analysis of Aereo’s tech points to a future in which the Court makes determinations based on other values: the protection of incumbent copyright owners over new entrants who seek to innovate—or manipulate—longstanding business practices.

Here’s our initial coverage of the Aereo case from May 2014

Supreme Court Debates Aereo Copyright Case

The Supreme Court heard arguments last week in the American Broadcasting Companies Inc, et al, v. Aereo Inc. case (No. 13-461) concerning allegations from broadcast companies that Aereo’s streaming service violates copyright of their content. According to most accounts, this case has the potential to dramatically transform the television industry, and, as Peter Decherney observes, "our definition of the home." The case has even been called “The Sony Betamax of this century.” At the very least, the *Aereo* case highlights the potential of digital technologies to de-stabilize longstanding industry norms, including the ways content is monetized, distributed, and consumed.

As noted by *The Hollywood Reporter,* the Aereo case is “a logical development at the intersection of three legal

technologies: DVRs, cloud computing and TV antennas." Aereo allows subscribers to watch and record broadcast programs via the Internet using dime-sized antennas and cloud-based servers that capture and store free, over-the-air content. This technology is one of Aereo's greatest assets, intellectual property that the company is actively trying to protect through 14 pending patent applications. With $97 million in backing from Barry Diller's IAC/InterActiveCorp, Aereo currently operates in 11 cities, though the service's penetration rates in those cities remains unclear.

Aereo has been in court with broadcasters over the legality of its operations since coming to market in 2012 (a thorough timeline of its history is available here). Aereo won its first victory in July 2012, when a New York federal court judge, Alison Nathan, denied an injunction request against Aereo (courts in other regions have struggled with similar cases). In April 2013, the Second Circuit Court of Appeals upheld Judge Nathan's 2012 decision. Broadcasters appealed to the Supreme Court, which held oral arguments on April 22, 2014.

Aereo has built its legal case on two key precedents, the *Betamax* (Sony v. Universal, full decision here) and *Cablevision* (Cartoon Network v. CSC Holdings, full decision here) cases. For a fuller discussion of these cases, the SCOTUS blog offers a detailed review. Key to both cases was

the matter of direct or contributory infringement; in simpler terms, are possible copyright violations the responsibility of the hardware provider or the consumer making use of the service? Aereo, for instance, argues that it is the subscriber who chooses to record and to view content, and that as a result, Aereo is not liable for those actions just as Sony was not liable for Betamax owners' recording and viewing of content.

Another possible legal complication that preoccupied the justices during their debate was the possibility that an Aereo decision could negatively impact the growing cloud storage industry, implicating companies like Dropbox and Google (who have publicly supported Aereo's argument). At the oral arguments, the Supreme Court justices searched for productive comparisons to work through the technological operations of Aereo's system. While Aereo calls itself a "natural evolution of the VCR," broadcasters prefer to equate Aereo with the cable industry. Chief Justice John Roberts considered Aereo as akin to Radio Shack, a communications and media equipment retailer, yet Justice Roberts also expressed concern that Aereo designed its technology with the intent to skirt copyright rules. The transmission of content over cable wires is treated as a public performance, and as such, cable providers must license broadcasters' content. If Aereo's technology is deemed a public performance in similar form, the company may be liable for paying broadcasters both a compulsory licensing fee (per the 1976 Copyright Act) and retransmission fees (per the Cable Act of 1992). If, on the other hand, the court views Aereo as a hardware provider akin to Radio Shack, rather than as a

company that publicly re-broadcasts content, it may be able to continue avoiding payment of those fees altogether.

Beyond the legal nitty gritty, the Aereo case draws attention to the shifting ground beneath the feet of broadcasters. While television broadcasters have historically based their business models on selling commercial time (and thus audiences) to advertisers, that revenue stream has significantly decreased as a consequence of channel proliferation and audience fragmentation.

To replace those losses, broadcasters have increasingly depended upon retransmission fees paid to them by cable operators. If Aereo can make the case that it does not have to pay those fees because consumer use of Aereo is a private, rather than a public, performance, broadcasters fear it will threaten the future of those payments, reducing or perhaps eliminating them altogether. Both sides have offered dramatic predictions of the possible impact of the Supreme Court's decision, including broadcasters threatening to stop operating over the public airwaves by becoming cable channels. Aereo, which has threatened it will go out of business if it loses, has created an advocacy site to advance its position. Commentators are working hard to read the tea leaves in advance of the Supreme Court's ruling, but historically the Court has tended to

craft narrow decisions when debating disruptive technologies. A decision is expected by early this summer.